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FILED
MAY 18 1959
JAMES R. BROWNING, Clerk

No. 860

In the Supreme Court of the United States

OCTOBER TERM, 1958

THE SENECA NATION OF INDIANS, PETITIONER

v.

WILBER M. BRUCKER, *Secretary of the Army*, and EMERSON C. ITSCHNER, *Major General, United States Army Corps of Engineers*, RESPONDENTS

PETITIONER'S REPLY BRIEF AND MOTION

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Petitioner's position herein is that Congress has made no appropriation of Petitioner's treaty lands but, on the contrary, has in effect reserved the critical decision whether to do so for current and future consideration dependent upon at least two possible eventualities, i.e. either (a) the consent of Petitioner to such taking or (b) a final legislative decision to proceed with, modify, or abandon the project for which such lands may be requisite (Pet. 8). In this setting Petitioner has sought an injunction to prevent an executive *de facto* "taking" which, as a *fait accompli* in the form of expenditure of large sums of public funds for "construction", would force legislative authorization or ratification of the project to the injury of Petitioner (Pet. 5-6). Compare *United States* v. *North American Transp. & Trading Co.*, 253 U. S. 330, 333.

The issue in the case is, therefore, the simple one of finality *vel non* of the ephemeral legislative actions taken in

the course of the past 18 years. No such statute on its face yet mentions these lands nor treaties nor Indians nor the Seneca, as may be perceived from inspection of Respondents' declaration of statutes involved (Resp. 2). Hence "explicitness" and "clarity", as Respondents would rephrase the question presented (Resp. 2, 3, 5), are not reached nor does Petitioner insist upon a "special statute" as Respondents suggest by footnote.[1]

There being no shred of evidence on the face of the cited legislation that Congress authorized the abrogation of the Seneca treaty and the taking of treaty lands, Respondents claim authority by "intent" (in such terms as awareness, knowledge, consideration, examination) gathered from legislative documents (reports, hearings, debate) and spread throughout their Response (pp. 2-8). But, while the statutory authorization is claimed by virtue of a statute passed in 1941, with one exception such "intent" relates to legislative history occurring 16 years later, in 1957, with reference to nothing more than an appropriation act equally devoid of any mention of the lands, treaty, or Indians. The single exception relates to a report of the Corps of Engineers, to which the old 1941 legislation refers and which is conditioned upon both a voluntary "agreement . . . with the Seneca" as well as Congressional approval thereof plus provision of substitute lands "to replace those taken" in such event (Pet. 3). The issue here is thus, as made by Respondents themselves, the existence of executive authority to abrogate the Seneca treaty by virtue of mere legislative "intent" assumed to be properly discoverable from legislative history in connection with nothing more than an appropriation measure mentioning only money, and occuring 16 years after the alleged primary legislation was adopted by the Congress.

Furthermore, as serious as the tribal problem is in the foregoing circumstances (Pet. 11), here even that alleged

[1] Response, p. 5, note 3. The inapplicability of the citations set forth there is further demonstrated in the decision annexed to the Petition herein as Appendix D thereof, pp. 22, 33.

"intent" in 1957 was not in any real sense a final one (Pet. 9), for the debate on the intrinsic merits of the project is even still and genuinely continuing in the House of Representatives (where appropriations for such projects originate) as the Petition points out (Pet. 10). Nonetheless, Respondents insist upon assuming not only a grant of authority to executive officers to take Seneca lands despite the Seneca treaty and resting on the tenuous ground of "intent" as described above, but further assume that the matter of such "intent" has been finally "decided" and decision "made" with the effect of "overruling the objections of the Indians" (Resp. 5, 6). However, any such legislative decision is still actively under consideration—a fact which is readily demonstrable since (a) the current Hearings of May 5, 6, and 14 will be printed and available to the Court and parties before the end of the month as counsel are well informed and believe and (b) the Report of the House appropriations committee on the subject should normally be available before the end of the coming month of June. Wherefore counsel for Petitioner suggest, and propose the following motion, in order that the Court may be fully advised in the premises:

MOTION

Petitioner, the Seneca Nation of Indians, moves this honorable Court as follows:

1) That Petitioner be permitted to file with the Clerk, for examination by the Court in connection with the Petition herein, a first print of the current Hearings on the subject of the status of the project involved, now just closed in the House of Representatives (which are not yet available in manuscript form but will be made available, as counsel are informed and advised, in such print form not later than the coming week of May 25);

2) That Petitioner be further permitted to so file the Report of the Committee on Appropriations of the House of Representatives as soon as available (presumably during the coming month of June);

3) And that Petitioner be further permitted to so file such further legislative documents as may indicate officially the Congressional disposition of the matter during the coming summer months.

Respectfully submitted,

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